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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 19

NEXSTAR BROADCASTING, INC. d/b/a KOIN-TV, and NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO,	No. 19-CA-240187 **BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

This matter is before the Honorable Amita B. Tracy, Administrative Law Judge, on a Complaint alleging that Nexstar Broadcasting, Inc., d/b/a KOIN-TV (the Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it unlawfully refused to provide relevant information requested by the National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51 (the Union) in connection with issues that arose during bargaining related to dues checkoff. Respondent's failure to provide the requested information affects the

Union's ability to bargain.[1] As such, the requested information is presumptively relevant, and the Respondent's failure to provide it constitutes an unfair labor practice.

II. STATEMENT OF FACTS

The facts in this case are simple and undisputed, as set forth in the Joint Motion and Stipulation of Facts:

A. Background

The Respondent operates a television station, KOIN-TV, in Portland, Oregon. (Stipulated Fact No. 4). The Union is the exclusive bargaining representative of the engineers, production employees, news and creative services employees, and web producers employed by the Respondent at KOIN-TV. (Stipulated Facts Nos. 12-14.)[2] There are about 45 employees in the bargaining units represented by the Union. (Stipulated Fact No. 12.)

The most recent collective bargaining agreement (CBA) was in effect from July 29, 2015 to August 18, 2017, with the last extension having expired on September 8, 2017. (Stipulated Fact No. 13.)

At all material times, Respondent and the Union were engaged in bargaining for a successor agreement to the expired CBA. (Stipulated Fact No. 15.)

B. Bargaining Regarding Dues Checkoff

Respondent and the Union began bargaining for a successor agreement on June 21, 2017. At that time, Respondent proposed to delete the dues checkoff clause. (Stipulated Fact No. 16.

[1] At this time, Respondent has unlawfully withdrawn recognition and refused to bargain at all, which is the subject of another pending unfair labor practice charge in Case No. 19-CA-255180. For that reason, the parties are not currently at the bargaining table at the time of this writing, but the Union seeks to compel Respondent to return to the bargaining table and continues to seek the information requested in this case.

[2] The Union was the exclusive bargaining representative of the same units employed by Media General KOIN-TV prior to January 2017. Respondent purchased the business of Media General KOIN-TV in January 2017, and has continued to operate the business in basically unchanged form, employing former employees of Media General KOIN-TV as a majority of its employees. (Stipulated Fact No. 5). As such, Respondent has stipulated that it is the successor to Media General KOIN-TV. (Stipulated Fact No. 6.)

At a bargaining session on or about December 14, 2018, Respondent proposed that the Union pay an offset of $10 per member per month to cover Respondent's payroll processing of dues checkoff costs. (Stipulated Fact Nos. 17 and 17(a).) Respondent represented that it had a practice of charging other unions for dues checkoff costs under its collective bargaining agreements with those other unions. (Stipulated Fact No. 17(b).)

On December 18, 2018, the Union requested information from Respondent related to Respondent's proposal for dues checkoff processing costs. (Stipulated Fact No. 19 and Exhibit E.) Specifically, the Union stated the relevance and made three requests as follows:

> In your proposal KOIN proposes that the "Union will reimburse the company $10.00 per employee on a monthly basis for services rendered by the company for dues checkoff practice." During bargaining you have contended that Nexstar has a practice of charging unions this amount in other union-represented locations. For the purpose of our evaluation of your proposal of December 14, 2018, please provide the following information:
>
> 1) List of specific contracts, with broadcast call letters, Union name and Local number, and copy of the current provision (with effective dates of the contract) that contain provisions where the union reimburses Nexstar for "dues checkoff practice."
>
> 2) Actual cost to Nexstar for the "dues checkoff practice" at each of the aforementioned broadcast stations, spelling out the costs and stations.
>
> 3) Actual current cost to Nexstar for "dues checkoff" processing at KOIN-TV. Please itemize the costs.

(Exhibit E.)

On January 3, 2019, Respondent sent the Union a memorandum in response to the Union's December 18 letter. (Stipulated Fact No. 20 and Exhibit F.) Respondent objected to items 1 and 2, refusing to provide responsive information; and Respondent did not object to item 3, but failed to provide the information the Union had requested, as follows:

> In response to your request for information dated 12/18/18 regarding due [sic] checkoff, we do not believe points #1 and #2, which call for the production of information from outside of the bargaining unit and do not involve the terms and conditions of employment of unit members, are relevant, and they seek the production of proprietary confidential information. As such, we

> respectfully object to provide a response to these requests on these basis.
>
> Regarding point #3, we believe KOIN management currently spends 4-5 hours per pay period assembling and distributing this information. We believe the time spent on this bi-weekly task easily justifies the several hundred dollars proposed in the latest Company proposal, C-6.

No other information was provided besides the estimate of hours per pay period supposedly spent on dues checkoff processing. (Stipulated Fact No. 20.)

At a bargaining session on January 24, 2019, Respondent claimed that "several other" NABET[3]-represented bargaining units had agreed to a $50.00 per month fee to process dues deduction, but no specific information was provided, nor did Respondent offer any accommodation regarding allegedly proprietary and confidential information. (Stipulated Fact Nos. 21 and 22.)

On April 23, 2019, during bargaining, Respondent made a revised proposal, Exhibit G, in which Respondent proposed that the Union pay $50.00 per month to process dues checkoff. (Stipulated Fact No. 23 and Exhibit G.) At the time Respondent presented the proposal, Respondent repeated that NABET had supposedly agreed to a similar processing fee in other locations and noted that Respondent had verified that the amount charged in these other locations was $50.00 per month. Casey Wenger, a managerial employee of Respondent who participated on Respondent's bargaining team, mentioned the time it takes him to process payroll due to the varying hours, pay, other cash compensation, and that dues vary from month to month given that dues are based on a percentage of gross compensation. (Stipulated Fact No. 23.)

At bargaining sessions on June 27, 2019 and October 7, 2019, the Union reiterated its request for information related to dues processing. Mr. Wenger again asserted that the amount of time spent on this work was approximately five hours per pay period and again indicated that NABET had supposedly agreed to such a fee in at least two other locations. Respondent never provided the CBAs from those other two locations. The Union's spokesperson, Carrie Biggs-

[3] NABET is the acronym for the National Association of Broadcast Employees & Technicians.

Adams, told Respondent that her research found only one location where another branch of the Union had agreed to a dues checkoff processing fee, and she explained why that situation was distinguishable from that of Respondent and the Union, including the fact that the fee was contingent on the bank being unable to process dues checkoff via automatic debit. (Stipulated Fact No. 24.)

The parties have had no other communications about the December 18, 2018 request or information. (Stipulated Fact No. 25.)

On August 2, 2019, Respondent unilaterally discontinued dues checkoff. (Stipulated Fact No. 26.) The parties have not yet reached a successor agreement to the expired CBA. (Stipulated Fact No. 27.)

III. LEGAL ANALYSIS

A. The information requested by the Union is relevant to bargaining

Under Section 8(a)(5) of the Act, an employer is required to provide the union with relevant information needed to enable it to properly perform its duties as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that an employer had a duty to provide information relevant to bargainable issues upon requests from the union)).

The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. *Pennsylvania Power & Light*, 301 NLRB 1104, 1105 (1991).

Requested information is relevant when it is directed at verifying the accuracy of a claim made by the employer in bargaining. *Caldwell Manufacturing Co*., 346 NLRB 1159, 1160 (2006) (relevance established where employer made specific factual assertions in bargaining concerning need to improve competitiveness and, thereafter, union requested cost and productivity information in part to evaluate the accuracy of the claims); *Shoppers Food Warehouse Corp*., 315 NLRB 258, 259 (1994) (union was not required to accept at face value an employer's assertion that two entities were separate operations). The U.S. Supreme Court stated in *Truitt Mfg. Co.* that if "an argument is important enough to present in the give and take of

bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152-153.

In this case, it is undisputed that, in bargaining, Respondent proposed that the Union pay Respondent $10.00 per member per month to cover payroll processing of "dues checkoff costs". It is also stipulated that Respondent made a claim, in support of the proposal, that it had a practice of charging other unions amounts to cover dues checkoff costs in collective bargaining agreements with other unions. (Stipulated Fact No. 17(b).) In the request for information, the Union references that claim, and the Union requests the items sought "[f]or the purpose of our evaluation of your proposal" to charge the Union $10.00 per member per month. (Exhibit E.)

Item 1 of the information request directly seeks to verify the accuracy of Respondent's claim of having a practice of charging unions for dues checkoff processing costs under other collective bargaining agreements. The Union simply asks for a list of those collective bargaining agreements and a copy of the provisions where those other unions, according to Respondent, reimburse Respondent for dues checkoff costs. Thus, it is readily apparent that item 1 of the information request is relevant to verify the accuracy of a claim made by Respondent in bargaining.

Item 2 seeks information relevant to Respondent's bargaining proposal, because Respondent supports its proposal on the basis that it has other collective bargaining agreements with other unions under which Respondent charges those unions for processing dues checkoff. If that is true, then item 3 is relevant information because it aims to assess both Respondent's supporting claim and whether Respondent's dues checkoff processing costs for the KOIN-TV bargaining units, if any, are comparable to its dues checkoff processing costs for those other locations, if any.

With respect to item 3, Respondent does not dispute the relevance, but Respondent has not actually provided any responsive information. Item 3 simply seeks the actual cost to Nexstar of processing dues checkoff at KOIN-TV, with itemization, so that the Union can intelligently bargain Respondent's proposal. Instead of providing the information requested, Respondent has

only spoken of the time it takes an administrator to process payroll generally, with variations in hours, pay, and other cash compensation. The time to process payroll is not responsive information because Respondent must process payroll, including the variations in hours and pay of which Mr. Wenger spoke, with or without dues checkoff. Therefore, it is not a cost of dues checkoff. If the time to process payroll includes, in part, any time to perform the deduction of the percentage of pay that represents dues, Respondent has not provided itemization of what time represents performing that deduction. If there is no true cost of processing dues checkoff (e.g., if dues are deducted through a column of a spreadsheet in which the spreadsheet software performs the percentage calculation at no additional cost to Respondent beyond what it would cost without dues checkoff), then in that case the answer is $0, and Respondent must provide that answer.

The Union has reiterated the information request after Respondent's modified proposal of April 23, 2019, and the information requested has continued to be relevant when the Union reiterated its requests. "[A] union's 'proffered reasons for demanding the information, as well as the employer's motives for refusing that demand, must be examined as of the time of the demand and the refusal." *Kraft Foods N. Am., Inc.*, 355 NLRB 753, 755 (2010) (citing *General Electric Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1998) (rejecting the notion that the relevance inquiry allows the Board to "consider the state of affairs by the time of the hearing"); *New York Printing Pressmen and Offset Workers Union v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976) (Board must examine reasons provided by employer at time it denied union's request for information, not explanation raised at hearing before the ALJ); *Burner Sys. Int'l, Inc.*, 273 NLRB 954, 960-62 (1984) (in defending unfair labor practice charge, employer may not justify conduct by relying on facts arising after the employer's action or on facts unknown to employer at time it acted). The relevance remains present after Respondent's April 23, 2019 proposal, modifying its proposal to charge the Union $50.00 per month instead of $10.00 per month per member, because Respondent again asserts in support of its April 23, 2019 proposal that NABET has supposedly agreed to a similar processing fee in other locations. (Stipulated Fact No. 23.) And while the Union conducted its own research and found one instance in which Respondent has

such a fee, it remains relevant to ask Respondent for information to verify its own claim in bargaining of a "practice" at other locations, plural.

B. Respondent's refusal is not justified by its claim of confidentiality

1. <u>There is no evidence in the record to support Respondent's claim that the information requested is proprietary and confidential</u>

It is the employer's burden to demonstrate that its claim of confidentiality is legitimate. (*Resorts Intern. Hotel Casino v. NLRB*, 996 F.2d 1553, 1556 (3d Cir. 1993); *U.S. Postal Service*, 332 NLRB 635 (2000).)

Here, it is Respondent who raised a claim in bargaining that it has a practice of charging other unions amounts for the costs of dues checkoff processing in other collective bargaining agreements at other locations. Respondent volunteered the subject of those other collective bargaining agreements, which it would not have done if such other agreements were proprietary and confidential. Moreover, Respondent has stipulated to the record in this matter, and the record includes no evidence that those other collective bargaining agreements are proprietary and confidential. Nor is there any evidence that the costs of processing dues checkoff at those other locations (as requested in item 2 of the Union's request for information) constitute proprietary and confidential information. Therefore, Respondent cannot meet its burden to demonstrate that the information requested in items 1 and 2 are proprietary and confidential.

2. <u>If the information requested were proprietary and confidential, Respondent had the duty to attempt to bargain an accommodation, but Respondent did not do so</u>

Where an employer receives a request for information that includes confidential information, it is required to attempt to bargain an accommodation which will allow it to provide the information sought while protecting the confidentiality of the information. It is the employer's burden to demonstrate that it has attempted to do so. (*U.S. Postal Service, supra*; *Exxon Co.*, 321 NLRB 126 (1996).)

Here, it is undisputed that Respondent made no attempt to propose an accommodation. (Stipulated Fact No. 22.) Nor did Respondent offer to bargain about whether an accommodation

would enable it to furnish the requested information. (See Exhibit F.) Accordingly, Respondent has not demonstrated a defense based upon alleged confidentiality.

In sum, Respondent violated the Act by refusing to provide relevant information requested by the Union, and Respondent has no meritorious defense.

IV. REMEDIES

The Union seeks a recommended order requiring Respondent to cease and desist from its unlawful conduct, provide the requested information, and bargain in good faith with the Union. The remedy should also include the following:

Respondent should be required to post permanently the Board's ill-fated employee rights notice. https://www.nlrb.gov/poster. The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of sixty (60) days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. *See* Cal. Lab. Code § 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behaviorists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies

ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions." The employer should not be present. The Union should be notified and allowed to be present. This should be on work time and paid. If the employees are working piece rate, the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally refused to turn over information that was relevant to bargaining and necessary to the Union's ability to perform its duties as the bargaining representative. We apologize. We have now been ordered to turn over all such requested information. We ask your forgiveness for violating the National Labor Relations Act.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the Notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should be incorporated on any company screensavers or opening windows or screens for all computers for the length of the posting period.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice, whether by email, on the wall or at home, on their own time is to punish them for their employer's misdeeds.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

V. CONCLUSION

The undisputed facts establish that Respondent has refused to provide the requested information in violation of § 8(a)(5) of the Act. The Administrative Law Judge should order the remedies sought by the Union.

Dated: July 1, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: ANNE I. YEN
Attorneys for Union

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On July 1, 2020, I served the following documents in the manner described below:

CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lgutierrez@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the Foregoing is true and correct. Executed on July 1, 2020, at Oakley, California.

Linda Gutierrez
Linda Gutierrez